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No. 94-650

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

EYAK NATIVE VILLAGE, *et al.*,
Petitioners,
v.
EXXON CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Exxon Respondents' effort to sow confusion in their Brief in Opposition (as well as in their Cross-Petition presenting unrelated questions, No. 94-855) does not diminish the clarity and importance of the discrete questions of law presented by our Petition. These are (1) whether consolidated filings in multi-case class action litigation constitute "joinder" for derivative "entire case" removal under 28 U.S.C. § 1441(c), and (2) whether federal-question removal jurisdiction can be derived by recharacterizing a plaintiff's argument against an anticipated *res judicata* defense as an affirmative challenge to a prior federal judgment.

1. There is no basis for Exxon's repeated assertions that these are "record-bound" issues unsuited to review on

certiorari. Every petition necessarily arises from a record. But there is nothing at all voluminous or obscure about the record materials relevant to this Petition:

(a) As to the first question presented, the Court need review only two paragraphs of the state court's first pretrial order and the basic outlines of the Amended and Consolidated Class Action Complaint, the Class Action Plaintiffs' Motion for Class Certification, and the Class Action Plaintiffs' Reply Memorandum in Support of Motion for Class Certification. The holding below that there was "joinder" of claims into a single "case" raises a straightforward question as to the legal significance of filing such documents on a consolidated basis pursuant to a conventional complex-litigation pretrial order.

(b) As to the second question presented, the Court need review only six pages of the Trust Class Plaintiffs' Reply Brief in Support of a Conservation Trust Class, to determine whether the Court of Appeals erred as a matter of law in holding that it was tantamount to an independent action to set the governmental consent decree aside, rather than simply a response to an anticipated defense that the consent decree would preclude the Trust Class claim.

Neither of the opinions below nor Exxon's Brief in Opposition identifies anything else in the record as in any way material to either of the questions presented by this Petition. And of course Exxon's invocation of the two-court rule is out of place where, as here, there is no issue of fact.[1]

2. None of Exxon's grab-bag of diversionary "additional considerations" has any pertinence to the suitability of these two questions of law for review.

(a) There is no basis for the suggestion (Br. in Opp. 1 n.1) that the Petition is not "timely" because it was not

[1] The Court of Appeals correctly noted that it was reviewing the District Court *de novo* (Pet. App. 8a).

filed earlier as a cross-petition to Exxon's petition seeking review of separate issues arising out of separate removal orders which happened to be reviewed in the same Court of Appeals decision (*Exxon Corp. v. Eyak Native Village*, No. 94-385, denied October 11, 1994, rehearing denied November 28, 1994).[2] We doubt that this would have been a proper cross-petition in view of the separateness of the orders, the cases and the plaintiffs involved.[3] In any event, Rule 13.5 of this Court's rules states very clearly that a cross-petition is always timely (without any requirement of conditionality) if filed within 90 days after the court of appeals judgment, as our Petition was.

(b) Exxon cites no authority for its assertion (Br. in Opp. 13-14) that Petitioners should not be allowed to seek review of the second question because the Trust Plaintiffs did not appeal. Exxon made no such assertion in the Court of Appeals, and that Court rested its decision on a full (though erroneous) analysis of the Trust Plaintiffs' removal posture. It is absurd to suggest that Petitioners lack standing to challenge this essential first premise of the removal of their state-law claims (and those of the classes they represent) from the state court in which they were filed.

(c) There is no significance here in the fact that Exxon has developed additional theories of diversity jurisdiction and waiver unrelated to the questions presented by this Petition (Br. in Opp. 14-16). Exxon has presented those theories to the District Court by a motion seeking to prevent remand to state court of the other cases which the Court of Appeals' decision held were improperly removed. The plaintiffs in those cases have

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[2] Exxon attempts to raise precisely the same issues yet again by its contingent cross-petition (*Exxon Corp. v. Eyak Native Village*, No. 94-855, filed at the same time as its Brief in Opposition). We are filing our opposition to Exxon's cross-petition at the same time as this Reply.

[3] The present Petitioners were thus no more than nominal respondents in No. 94-385. See p. 7 n.6 of our Petition.

opposed Exxon's motion in the District Court on a number of grounds.[4] Even if Exxon's alternative theories of federal jurisdiction were ultimately to succeed, that unlikely occurrence would not detract from the importance of the discrete issues presented by this Petition.

For the foregoing reasons and those previously stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[4] *Inter alia*, Exxon's diversity theory comes too late under the last clause of 28 U.S.C. § 1446(b), and its waiver theory is negated by plaintiffs' consistent objections to removal jurisdiction and indeed Exxon's own stipulation that those objections were preserved. In the lower courts as well as here, Exxon has let no stone, however tiny, go unturned in its tireless campaign to limit its liability by making the District Court's restrictive rulings on the scope of compensatory damages applicable to as many plaintiffs and class members as possible.